From: Chard-McClary, Shellie <Shellie.Chard-McClary@deq.ok.gov>
Sent: Thursday, July 17, 2014 5:17 PM
To: TASreinterpretation
Subject: Oklahoma DEQ Preliminary Comments

Fred –
As discussed on the ECOS Water Committee Call, I have attached the document that Oklahoma DEQ's General Council prepared and submitted to Western States Water Council.

Thanks
Shellie

Shellie Chard-McClary
Water Quality Division Director
Oklahoma Department of Environmental Quality
707 N. Robinson
P.O. Box 1677
Oklahoma City, OK 73101-1677
(405) 702-8157 Office
(405) 702-8101 Fax

COMMENTS BY THE OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY (ODEQ) REGARDING EPA's POTENTIAL REINTERPRETATION OF A CLEAN WATER ACT PROVISION REGARDING TRIBAL ELIGIBILITY TO ADMINISTER REGULATORY PROGRAMS

ODEQ Comment #1 – EPA's potential reinterpretation of CWA section 518 as an express delegation by Congress to eligible tribes to administer CWA regulatory programs over their entire reservations is unworkable in Oklahoma. The reason for this is simple. There are no "reservations" within the State of Oklahoma due to Congressional and executive actions in the late 19th and early 20th centuries. (See Francis Paul Prucha, *The Great Father,* p. 757 (1984)

In fact, EPA itself has recognized the unique situation in Oklahoma in its unpublished Advanced Notice of Public Rulemaking of November 2003, entitled "Proposed Core Federal Water Quality Standards for Indian Country." In that document, EPA stated,

> [I]n some areas, allotments comprise the bulk of Indian country. For example, it is EPA's understanding that off-reservation allotments or Tribal trust lands . . . comprise almost all of the Indian country for Tribes in Oklahoma . . . Of these off-reservation lands, it is EPA's understanding that approximately 90 – 95 percent are comprised of off-reservation allotments, and 5- 10 percent of these lands are Tribal trust lands.

These facts have not changed since 2003. Therefore, at least within the boundaries of Oklahoma, the only areas a tribe could possibly identify for purposes of its eligibility to administer regulatory programs under CWA are individual parcels of tribal trust land. These lands are not contiguous; they are scattered randomly across the State and are not within the limits of any reservation. Any attempt by EPA to allow tribes to regulate CWA programs in Oklahoma in the absence of a specific identification of trust lands will result in needless regulatory confusion, jurisdictional entanglements within the State and possible litigation.

ODEQ Comment #2 – In its statement regarding the potential reinterpretation, EPA indicates that it will "still provide state and other appropriate governmental entities the opportunity to comment on the tribe's assertion of authority before EPA approves or disapproves TAS for the tribe." The effect of this in Oklahoma would be simply to shift the tribe's rightful burden of demonstrating authority over any given parcel of tribal trust land to the State. The State then would likely have to rely on the tribe itself or BIA for documentation regarding the area's status as tribal trust land. For that reason, it makes sense for EPA to recognize in its potential rulemaking that there are no tribal reservations in Oklahoma and to require documentation of authority over such areas by the tribal TAS applicant accordingly.

The Oklahoma DEQ reserves the right to amend these comments and/or make additional comments if and when EPA publishes its proposed rule.